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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 753.

THOMAS T. COHEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER.

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The Government concedes that the nine months during which petitioner remained in federal custody in Florida, unaware of the federal indictment against him in Arizona, was a "period of unnecessary delay" [1] which was "unfortunate" [2] but "not so detrimental" [3] as to be a violation of petitioner's constitutional and legal rights. And it brushes aside "[a]ny injustice which might have been

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[1] GB. 6. References to the Government's Brief throughout this Reply Brief will be by "GB" followed by a page number. The Petition for Writ of Certiorari is referred to as "P." The Transcript of Record is referred to as "TR." The Reporter's Transcript of Proceedings is referred to as "RT" and the Official Transcript of Proceedings is referred to as "TP." Numerical references which follow these designations are to page numbers in the pertinent volumes. Throughout this brief, unless otherwise indicated, emphasis and bracketed material has been supplied.

[2] *Ibid.*

[3] *Ibid.*

involved in petitioner's incarceration in Florida" [4] on the ground that such injustice "was appropriately redressed by the dismissal of the first indictment," [5] noting further that by imposing less than the maximum sentence upon petitioner, the trial court "took this period of incarceration into account." [6]

The Government seeks to neutralize the legal and constitutional poisons manifest in the recital of events during the more than three years preceding petitioner's conviction on the basis of the following syllogism:

> I. By dismissing the first indictment, (says the Government) the trial judge demonstrated "no substantial doubt as to his intention to dismiss solely for lack of prosecution" [7] and not for constitutional reasons.
>
> II. Such a dismissal on non-constitutional grounds "is without prejudice to reindictment and retrial." [8]
>
> III. Furthermore (continues the Government) there was no constitutional basis for the first dismissal because petitioner was not prejudiced by the period of unnecessary delay in arraignment and prosecution under the indictment.[9]

Each of these premises will be examined in sequence below.

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[4] GB. 7.

[5] *Ibid.*

[6] *Ibid.*

[7] GB. 5.

[8] *Ibid.*

[9] GB. 5-7.

I.

The first indictment was dismissed upon constitutional grounds.

Despite the government's shrill assertion that "there is, on the present record, no substantial doubt as to [the trial court's] intention to dismiss [the first indictment] solely for lack of prosecution" [10] and not for constitutional reasons, the record here is replete with proof that the dismissal of the first indictment was based exclusively upon a finding by the district court that the Speedy Trial Clause of the Sixth Amendment had been violated by the Government.[11]

And the government's apparent attempt to demonstrate that the district court dismissed the first indictment only after he was satisfied that petitioner would be reindicted upon identical charges[12] is neither factually demonstrable nor legally relevant.

The government says little but insinuates much when it notes that "*it was only after the government indicated its intention to reindict that the first indictment was ordered dismissed.*" [13] It is apparently the government's intention to suggest that but for the district court's satisfaction that the government would reindict petitioner on identical charges, it would not have found a Sixth Amendment violation, nor dismissed the first indictment. The record amply refutes this attempt to confuse sequence with consequence.

For while the court at first attempted to avoid deciding the constitutional problem presented to it for deter-

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[10] GB. 5.

[11] P. 6-10; 26-27.

[12] GB. 5.

[13] GB. 5.

mination, when pressed by defense counsel to make a constitutional ruling of dismissal, the court saw its duty clearly and performed it, quite independent of when or whether the government elected to reindict. The pertinent colloquy at the hearing is instructive:

> The Court: "Well, I should think that you would want to dismiss this indictment following the re-indictment of this man."
>
> Mr. Karas (government counsel): "With a superseding indictment, yes, sir."
>
> The Court: "Yes. And a timely arraignment. Now, if that is your desire, and you represent to the court that that will be done, *I will deny this motion* [to dismiss on Sixth Amendment grounds]. But if you don't represent that it will be done, *I will grant the motion.*[14]
>
> Mr. Karas: "The matter will be presented as soon as possible, your Honor, to the next Grand Jury." RT. 39.
>
> * * * * *
>
> The Court: "Well, I will continue the motion for further hearing * * *." RT. 40.
>
> * * * * *
>
> Mr. Green (defense counsel): "* * * I would request the court at this time to either dismiss the indictment, if my motion is well founded; or to deny my motion in its entirety so I at least have my record * * *"
>
> The Court: "Well, the Government will dismiss it. I am just trying to be practical about the matter, that's all." RT. 42.
>
> Mr. Green: "* * * If the court feels I have sustained my motion, I urge the court to grant it. If

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[14] It should be noted that the court here is saying that it will *deny* the motion to dismiss if the government represents that it will reindict; the government has suggested in its argument that the motion to dismiss was *granted* as a consequence of its representation to the court that it would reindict!

not, I would like to preserve my record and have my motion denied.

"There were two indictments in Florida which were dismissed by Government counsel's own admissions. On those two indictments they didn't re-indict because they didn't have the evidence.

"The third indictment was dismissed on the motion of the Government for insufficient evidence.

"This was the fourth one that they had hanging over his head. And he has done eighteen months * * *." RT. 43.

* * * * * *

The Court: "The question now is whether I should dismiss this * * *." RT. 51.

Mr. Muecke (government counsel): "Well, if the court is wanting us to re-indict—"

The Court: *"No, I am not wanting you to do anything. You are the prosecutor."* RT. 52.

* * * * *

Mr. Karas: "Your Honor, the court had previously made a ruling [permitting voluntary dismissal of the first indictment by the government after re-indictment]."

The Court: *"No. I hadn't made any ruling,* I just indicated."

Mr. Karas: "Well the court inferred what action it might take. Now, if the court attempts now to change the action it inferred prior to this time, I would like to make a statement to the court, if I could."

The Court: Yes. *It's put squarely to me by the defendant.* I just *suppose* the Government will re-indict. While there is life there is hope, and the defendant hopes the Government will not. And, of course, *the Government may not.* The history of the Government's indictments and dismissals in the Southern District of Florida may well give the de-

fendant hope that the same experience will be had here." RT. 57.

* * * * *

The Court: "* * * you know what the Government's duty is under the Sixth Amendment. * * * The Government is prosecuting this man. He should have been promptly arraigned. He should have been brought to a speedy trial. And when it is put squarely to me, as defense counsel does, to rule on this motion, I would stultify myself to deny it, when the man has not even been told of the existence of the indictment for nine months. * * *" RT. 59-60.

* * * * *

The Court: "* * * I may be in error in this matter, but I am not in doubt. My duty is to dismiss the indictment. And it will be so ordered." RT. 62-63.

The foregoing excerpt of the record[15] demonstrates clearly that the district judge, when pressed by defense counsel to make a ruling, felt himself bound, on the basis of Sixth Amendment considerations, to dismiss the first indictment—whether or not the government chose to subsequently reindict the petitioner on these or other charges.

Why then, asks the Government, did the trial judge order petitioner continued on bail after dismissing the first indictment, if not in anticipation of a subsequent indictment? The record again is abundantly explicit. The district judge, aware that the government might reindict petitioner on these or other grounds, and attempting to minimize the hardship to petitioner of further prosecution—hardship already manifest from the dismissal without trial of four previous federal indictments within a span of several years, sought to avoid the petitioner's obligation to pay an additional bond premium in the event of

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[15] Together with the further colloquy at the same hearing quoted at P. 6-10.

subsequent indictment—a rather modest humane gesture in view of the mesh of federal prosecution in which petition was entangled. And all of the trial court's comments with respect to voluntary dismissal of the first indictment by the government and the possibility of petitioner's subsequent reindictment were directed only to such concern.

The following colloquy is illustrative:

> The Court: "* * * The defendant is at liberty on bail, is he?"
>
> Mr. Green: "Yes, sir, the defendant is presently on bail."
>
> The Court: "The clerk will give you a form of stipulation to transfer the bail in this case to any other indictment that may be returned, and that may save you a premium on the bail bond * * *."
>
> * * * * *
>
> The Court: "I will continue [this matter] to [another date]. And if the defendant has been reindicted and arraigned at that time, and plea entered, I am certain that Judge Hall will give you [the government] leave to file a voluntary dismissal of this indictment * * *." RT. 41.

Whereupon defense counsel urged the court to dismiss the first indictment. RT. 41.

> The Court: "Would you be any better off with a dismissal? They will reindict you again.
>
> * * * * *
>
> The Court: "If I dismiss it, I will continue his bail under the rule for 30 days." RT. 41-42.

Defense counsel continued to press the court to dismiss the first indictment. RT. 42.

> The Court: "Well, the Government will dismiss it. I'm just trying to be practical about the matter, that's all." RT. 42.

After further pressure for a ruling from defense counsel:

> The Court: "The question now is whether I should dismiss this [indictment]. The reason I brought up that subject, I was interested in continuing the bail of the defendant under Rule 12(b)(5) which provides that if the court grants a motion based on a defect in the institution of the prosecution or the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. *So I was, frankly, searching for a ground that would permit the continuance of bail there.* I just can't satisfy myself that waiting nine months to tell this man he was indicted is consistent with his Sixth Amendment rights to a speedy and public trial. I just can't see any excuse for it." RT. 51-52.
>
> * * * * *
>
> The Court: "* * * the question is whether I should continue the defendant's bail. It's a question not only in which the Government is interested, but it is a question in which the defendant might be interested: *It might save him a bail bond premium.* RT. 52.
>
> * * * * *
>
> Mr. Green: "Your Honor, I would like to have the indictment dismissed * * *."
>
> The Court: "Well, do you wish the bail continued? * * *."
>
> Mr. Green: "Well, your Honor, if there is no indictment, there is no bail."
>
> The Court: "But the rule provides * * *."
>
> Mr. Green: "You are talking about Rule 12. I don't think this indictment comes under Rule 12."
>
> The Court: "Then you will have another bail bond premium to pay."

Mr. Green: "If he is re-indicted, yes, sir. I realize that the court is trying to make it convenient for me, but * * *.

The Court: *"I just don't like to give the money to the bonding company unnecessarily, that's all."* RT. 53.

* * * * *

The Court: "You don't wish the bail continued, then?

Mr. Green: "Your Honor, I wish the indictment dismissed."

The Court: "Well, if they don't indict him again * * * I just don't understand your lack of desire to have the bail continued. Because if I continue the bail, the bail can serve on a new indictment, if he is indicted. If the Government doesn't indict him, if you are successful in persuading the Government not to indict him, then, of course, the bail would be exonerated. But I just can't understand your desire to pay another bail bond premium.

* * * * *

The Court: "The bail, if it is continued, would serve as bail on a new indictment, if and when and as it's returned."

* * * * *

The Court: "The reason I am asking you about it, because I have grave doubt whether a dismissal upon this ground is strictly within the rule [Rule 12], but if the defendant asks me to, I will continue the bail under the rule, and if no one appeals from it, that will be the bail."

Mr. Green: "In the event that the court sees fit to dismiss this indictment today, we make our motion under Rule 12(b) that the bail be continued in the event that the Government re-indicts." RT. 55-56.

* * * * *

> The Court (after dismissing the first indictment): "I will continue the bail in effect pursuant to Rule 12(b)(5) * * * until * * * 12:00 o'clock noon [sixty days later] * * * and if there is no re-indictment at that time, the bail will stand exonerated."

It is clear that the court, in continuing petitioner's bail, was realistically noting the probability that the government would reindict petitioner, not endorsing such prosecutorial conduct. And in continuing bail, the court was well aware that subsequent reindictment of petitioner on the same charges would be met by fierce legal resistance of the defense,[16] during which interim period petitioner would still be faced with the necessity of release from custody on bail.

II.

Dismissal of an indictment on constitutional grounds bars subsequent reindictment for the same offense.

But whether or not, as a matter of fact, the trial court intended that the government reindict petitioner is hopelessly irrelevant to the legal issues in the case at bar. For *Mann v. United States*,[17] heavily relied upon by the government and the court below, teaches that "a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense." [18]

Petitioner has already demonstrated that the dismissal of the first indictment in the case at bar was based upon just such a constitutional finding.[19] It follows ineluctably from the holding in *Mann* as well as from the

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[16] RT. 44, 53-54.

[17] 304 F. 2d 394 (D. C. Cir. 1962).

[18] *Id.* at 397.

[19] P. 6-10, 24-29; and see argument, pp. 3-10, *supra*.

fount of common sense, that, whatever the notions of the district court as to the effect of such a constitutional finding, the constitutional infirmity of delay cannot be cured by bringing a subsequent indictment bearing a new case number, making precisely the same charges in precisely the same language, sixty days later. And the government's suggestion that all of the constitutional defects found by the district judge to be the basis of dismissal of the first indictment were "appropriately redressed" [20] by its dismissal, so that petitioner had no legitimate complaint against the second indictment, even though identical in form and substance to the first, is as cynical an argument as the government conduct which it now seeks to justify.

III.

The District Court ruling that the unnecessary delay in prosecuting petitioner violated his Sixth Amendment right to a speedy trial was justified.

In a surprising display of righteous fervor, the government, having foregone its right to appeal the district court's dismissal of the first indictment and its finding that petitioner's Sixth Amendment right to a speedy trial had been violated,[21] now seeks to resolve this crucial constitutional question *de novo*.[22] It suggests that the unnecessary delay in prosecuting petitioner or advising him of the federal indictment against him, while detrimental, was not "so detrimental as to warrant granting petitioner immunity from prosecution." [23] It suggests that the delay was more

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[20] GB. 7.

[21] P. 4, 27.

[22] Under more permissive ground rules than would have been available to it on appeal from the dismissal of the first indictment. See discussion, P. 27-28.

[23] GB. 6.

detrimental to the government than to petitioner,[24] as if the denial of petitioner's right to a speedy trial were somehow to be cancelled out by, or weighed against, the government's inconvenience. It urges that only an eight month period out of more than three and one-half years of continuous federal prosecution may be considered in determining whether petitioner's Sixth Amendment rights have been violated,[25] without mentioning or attempting to distinguish the authorities cited by petitioner which support the proposition that Sixth Amendment Speedy Trial Clause considerations require examination of the entire period between offense and trial.[26] It refuses to allow itself to become acquainted with the facts demonstrating actual prejudice to petitioner[27] and its failure to comment upon petitioner's cited authorities demonstrating that a pre-

[24] GB. 6-7. The inconvenience to the government resulting from its self-induced delay is not apparent from the record. Its witnesses' recollection of events pertaining to the charges in the indictment was crystal-clear; dimmed memories were most apparent with respect to collateral matters, particularly during cross-examination by the defense.

[25] GB. 6.

[26] P. 18.

[27] P. 11-12, 23. In response to the charge that "petitioner mentions no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared," GB. 7, petitioner may refer to several specific instances of precisely that prejudicial nature: petitioner's attempt to produce the government's response to his letter to the postal department seeking an opinion on the lawfulness of the scheme for which he was ultimately convicted, frustrated by the policy of the postal department to destroy its three year old correspondence, TR. 1049, 1053, the postal department's failure to keep daily reports made in 1962 which were sought by the defense, TR. 1042, and the failure, due to the passage of time, of a public stenographer who typed petitioner's letter to the postal department to keep her stenographic notes, TR. 296, are just a few examples. All of this documentary evidence, had it been in existence at the time of trial, would have corroborated petitioner's defense that he had sought and received approval from the postal authorities for the scheme upon which his indictment and conviction were based.

sumption of prejudice is raised by unreasonable delay is a particularly noteworthy gap in the government's position. And its insinuation that the failure of the trial court to impose the maximum sentence upon petitioner in some mystical fashion redresses his constitutional grievances because the court (so the government speculates *de hors* the record) took his prior difficulties "into account" in imposing sentence[28] would be ludicrous if its consequences were not tragic.

The government's desperate[29] attempt to validate within constitutional limits its conduct toward petitioner in this prosecutorial marathon refutes itself. Its affirmative arguments are factually incorrect and legally unsound. Its silences demonstrate the paucity of its position in deafening fashion. And even if its Sixth Amendment arguments were valid, they are made too late.

Conclusion.

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

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[28] GB. 7.

[29] In its grasp for straws, the government observes that "[c]ontrary to the implication in the petition (Pet. 12), petitioner did take the stand." GB. 3. It is true that petitioner testified for the limited purpose of proving his correspondence with the postal authorities, but he did not testify to the *merits* in his own defense—the point of the statement in the Petition (P. 12) with which the government takes issue.